IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 251 OF 2000.

1. Bharat Dwarkanath Dharne
2. Smt.Pushpa Jagannath Purav ....Appellants
(Orig.Accd.Nos.1 & 2)

V/s

The State of Maharashtra ....Respondent.

Mr. H. E. Mooman with Ms.Farzan Khan for the appellants.

Mrs. U. V. Kejriwal, APP for the State.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, JJ.

16.3.2005.

Oral Judgment: (**Per Palshikar, J)**

Being aggrieved by the order of conviction and sentence passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No.452 of 1997 on 6.3.2000 the appellants-accused have preferred this appeal on the grounds mentioned in the memo of appeal and also verbally canvassed before us.

2. With the assistance of the learned counsel for the appellants and the learned Additional Public Prosecutor we have perused the entire evidence and reappreciated the same.

3. The prosecution story as it emerges from our reappreciation of evidence

stated briefly is that on 10.2.1997 at about 10.30 in the morning there was a dispute in the family of the victim and the accused. Such disputes were usual and therefore were liable to be ignored. However to avoid recurrence mother of the victim Asha went to the police station to lodge a complaint about the happenings earlier that day. The other side was also represented in the police station by the sister of victim's father (Aatya) and the victim was alone in the house. It is the case of the prosecution that when the victim was alone in the house accused No.1 entered the house, poured kerosene on her and the accused No.2 lighted the clothes of the victim and the victim started burning and cried for help but none came. Ultimately mother came, took the victim to the hospital where she died during the treatment. When the victim was in the hospital her dying declaration was recorded. Investigation was undertaken and the accused persons were prosecuted as mentioned above. The prosecution examined as many as 10 witnesses to prove its case and the learned trial Judge on appreciation of the evidence came to the conclusion of guilt and consistent with that conclusion sentenced the accused to suffer imprisonment for life. It is this order which is impugned in this appeal as mentioned above.

4. It is to be noted that in this case there are two dying declarations and we have to reappreciate the evidence to find out whether the order of conviction is legal and valid. P.W.1-Arun Ganesh Jogde is the Special Executive Officer who recorded the dying declaration of victim Asha and has proved it as Exhibit 9. He has stated the manner in which the statement was recorded. Exhibit 9 is therefore the first dying declaration made by the victim before the Special Executive Magistrate. We will consider what has been stated by the victim in this declaration. The statement is very

elucidate. She first describes how there was quarrel between her father and his sister and other relations, how it related to their accommodation and how there used to be quarrels almost daily.

5. Then she proceeds to tell what happened in the morning of 10.2.1997. She states how the quarrel started and how her mother and her paternal aunt went to police station. Then she states that around 11.30 in the morning when she was alone in the house her paternal aunt of husband (referred to by the victim as Aatya, Mama as the custom in Marathi is to refer to husband of paternal aunt as Kaka) accused No.1 poured kerosene on her body and therefore she was scared and started running. At this stage we would like to note one discrepancy in this statement of the victim Asha as she has stated in vernacular requires to be reproduced :

"साधारण। सकाळी 11-30 वाजता मी ए कटीच घरामध्ये असते वेळी माझे आत्या, मामा व भरत धरणे हे आमचे घरामध्ये आले व त्यांनी पुरवयांच्याच म्हणजे माझ्या घरातील रॉकेल कॅन घेउन मासे अंगावर रॉकेल ओतले. त्यानंतर मी सैरभैर घाबरून पळू लागले. अश अवस्थेत मी आत्या श्रीमती भारती यांचे घरासमोर आले असते वेळी आत्ते-मामा व काकी पुष्पा यांनी पकडून

काडयापेटीने कपडयास आग लावली. सदर वेळी मी सैरभैर पळत असतांना, 'वाचवा-वाचवा' ओरडत असतानाहि मला कोणीही वाचविण्यास आले नाही''

It will be seen from the above that it is claim of Asha that when she was alone in the house the husband of her paternal aunt (Aatya Mama) and Bharat Dharne entered the house and " कॅन घेउन मास्रे अंगावर रॅकेल ओतले''. It means kerosene was poured by the husband of paternal aunt and Bharat Dharne accused No.1. This statement therefore creates a reasonable doubt as to whether Bharat Dharne was the husband of the paternal aunt of the victim. The victim then goes to say that she left the house and was caught by accused No.2 and set on fire. Nobody came to her rescue. If this statement is to be accepted there is no explanation whatsoever on record to show how the victim was rescued from inside the house.

6. P.W.2-Ramesh Ganpat Purav is the father of the victim who was not present. His evidence is therefore in consequential. P.Ws. 3 and 4 are the persons staying in the neighbourhood who were called by the brother of the victim. They saw the victim in burning state and took her to hospital. P. W. 5 is the panch. P.W. 6 is Dr.Vithal H. Vinurkar. P.W 7 is Dr.Abhay Bhalchandra Chaudhary and P.W. 8 is Dr.Nimesh Dinesh Shah. The prosecution has examined three doctors in order to prove that the dying declaration made by the victim was proper. It was recorded by the police officer. It bears the certificate of medical officer who was examined as P.W. 7 and who has stated that the statement was recorded in his presence. This witness Dr.Abhay Chaudhary P.W.

7 has however stated in examination in chief that it was not possible for him to state on the day when his deposition was recorded as to whether the patient was in position to talk at the time when the declaration was recorded. Then he has stated that the condition of the patient was very poor when she was brought to the hospital. He has neither examined her nor checked her blood pressure but has stated that the condition of the patient was deteriorating from time to time and yet he certified that the patient was in condition to depose. Assuming this to be a correct statement we will consider Exh.20. In this statement it is made clear by the victim that Bharat Dharne is the husband of her maternal uncle. She then alleges that he poured kerosene on her, she was lighted and therefore she ran out of the house, when she was in front of the house of accused No.2, accused No.2 caught her and put fire to her clothes. The statement is therefore almost similar to Ex.9 and both the statements therefore disclose that the accused poured kerosene on her body, she ran out of the house, was then caught and put on fire. The prosecution has completely failed to bring on record any evidence to show as to how the victim was brought back to house as the body is recovered from the house as will be seen from the statements of P.Ws. 3 and 4. In our opinion both the dying declarations therefore suffer from material infirmities and irregularities. The certifying doctor having admitted that the condition of the patient was very poor and deteriorating could not have certified that the patient was fit in mental condition to give statement. Apart from this there are several other aspects in the evidence which are required to be noticed.

7. The investigating officer P.W. 10 has admitted in cross examination that after he recorded the statement of P.Ws. 3 and 4 he realised that the testimony of Sagar

brother of the deceased would be more important yet his statement was not recorded nor was he examined before the Court. He is the person who is alleged to have called P.Ws. 3 and 4. It is likely therefore that he was an eye witness to the incident. There is no evidence as to where this person was at the time when the incident occurred. Except the statements made by the victim Exhibits 9 and 20 there is therefore nothing on record to show as to what exactly transpired in and around 11.30/12.00 on 10.2.1997. This omission on the part of the prosecution to examine an important witness, omission to examine any other witness available to prove the quarrel between the parties on 10.2.1997 and the serious discrepancies in the evidence would create reasonable doubt in the mind of any prudent person as to whether that exactly is what had happened. Why Sagar was not examined. Why P. W. 7 Dr.Chaudhary certified that the patient was in a conscious condition and was in a position to depose when the condition of the patient was very poor according to the doctor. All these infirmities and aspects therefore raise a reasonable doubt as to whether the prosecution has proved that it was the accused who murdered the victim.

8. We find it unsafe in such circumstances to rely on the completely uncorroborated testimony of the victim in Exhs. 9 and 20. But for this testimony there is no evidence on record which will warrant conviction to be maintained. The undue reliance placed by the learned trial Judge on uncorroborated dying declaration of the victim was therefore improper. We are unable to agree with the same. We are of the opinion that the prosecution has failed to prove the guilt of the accused beyond doubt. Non-examination of Sagar, legal infirmities in the dying declarations, admission of

investigating officer regarding improper investigation require that the benefit must go to the appellants-accused. In our opinion, it is not possible for us to uphold the order of conviction. In the result therefore the appeal succeeds and is allowed. The order of conviction and sentence is set aside. Accursed are liable to be released forthwith if not otherwise required.